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Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
PETITIONER,
vs.
SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
RESPONDENTS.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
PETITIONER,
vs.
JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE MASSACHUSETTS ASSOCIATION OF SCHOOL SUPERINTENDENTS, THE MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF AUTHORITY AND CONSENT TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States, consent of the parties was obtained for the filing of this amici curiae brief in support of Respondents. Copies of the written consents on behalf of the Respondents and Petitioners have been filed with the Clerk of this Court.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Massachusetts Association of School Superintendents ("MASS"), incorporated in 1973, is a statewide organization dedicated to enhancing the educational interests and opportunities of Massachusetts' school children. MASS articulates the unique perspective of school superintendents on behalf of students and also advocates for the professional concerns of almost 400 superintendents and assistant superintendents in Massachusetts. MASS believes that a diverse educational community enhances educational opportunities for children. As a result, MASS strongly supports the historic legal principle that the public education system has a responsibility to provide high quality education to each and every one of its students. MASS supports the use of voluntary school desegregation programs that further racial and ethnic diversity and believes these plans as used in Massachusetts' schools provide valuable educational benefits.

The mission of the Massachusetts Association of School Committees, Inc. ("MASC") is to support the Commonwealth's school leaders in their governance roles. School committees are legally responsible for developing and approving all policies related to district governance, including policies related to student assignment, transfer and desegregation where applicable. Representing a diverse group of almost 300 urban, suburban, rural, regional, and vocational-technical school committees, MASC provides guidance on

[1] Pursuant to Supreme Court Rule 376, Counsel for Amici Curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person other than Amici Curiae, its members, and its counsel make a monetary contribution to the preparation and submission of this brief.

local policy development and communicates members' perspectives to government leaders, administrative agencies and other education-related organizations. MASC believes it is important for school committees to have the ability to utilize voluntary school desegregation plans that promote racial integration and further the educational interests of students and the community. Massachusetts' schools have benefited from the ability to enact voluntary desegregation plans that foster integrated educational opportunities.

INTRODUCTION

In the mid 19th century, Horace Mann, a Massachusetts native, articulated a vision for public education that would profoundly shape our country's thinking. Mann championed a system of "common schools" where children "of all classes and elements of society would be educated together and thus acquire the mutual respect essential to a democracy." THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF EDUCATION, ANNUAL DESEGREGATION AND EQUITY REPORT (1987). Roughly a century later this Court echoed Mann's ideals in its seminal decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954):

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

> principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Id.* at 493.

The notion that racial segregation is damaging to the development of young minds and the social fabric of our nation is inextricably linked to Mann's vision. This fundamental premise and the ills of racially segregated public education have been expressly recognized by the Court for over half a century. In *Brown*, the Court observed that, "Segregation of white and colored children in public schools has a detrimental effect upon colored children." *Id.* at 494. What was true in the context of a "separate-but-equal" environment remains equally true today regardless of whether the segregation is *de jure* or *de facto* and regardless of the demographic makeup of the marginalized group. "A great deal of learning occurs informally ... through interactions among students of both sexes; of different races, religions, and backgrounds." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n. 48 (1978). "[T]he skills needed in today's increasingly global market place can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Since *Brown*, Massachusetts has pioneered efforts to decrease segregation in its public schools. In 1965, Massachusetts enacted the Racial Imbalance Act ("RIA"), which made it "the policy of the commonwealth to encourage all school committees to adopt as educational

objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools" and provided that "prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines, establishing of grade levels, and the selection of new school sites." M.G.L. c. 71, § 37C. Under the RIA, several Massachusetts school districts have instituted "Magnet Schools" programs in response to the persistent challenge of racial isolation in public schools. Others, such as the school district in Lynn, Massachusetts, have adopted voluntary desegregation programs, like those in Seattle and Jefferson County that are before the Court. *See Comfort v. Lynn School Committee,* 418 F.3d 1, 7-9 (1st Cir. 2005).

One year after it enacted the RIA, Massachusetts adopted legislation that authorized the "school committee of any city or town or any regional district school committee [to] adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial imbalance ... exists in a public school." M.G.L. c. 76, § 12A. Under this statutory grant, the Metropolitan Council for Educational Opportunity ("METCO"), an organization overseen by the Massachusetts Department of Education, initiated a voluntary program to transport students from urban and inner-city neighborhoods to suburban schools, which receive additional state funding. In 2006, 3,300 students and thirty-eight school districts participated in the METCO program.

Despite these efforts in Massachusetts and despite the decades-long efforts by courts and legislatures at the state and federal level to cultivate integration nationwide, Mann's vision of a diversified

"common school" remains unrealized. As the nation's population grows more diverse,[2] integration of public schools has proven challenging, and at times elusive. Substantial gaps remain in educational opportunity between white and non-white students.[3]

Therefore, the integration of public schools through voluntary desegregation programs is an issue of vital importance to the nation as well as the *Amici*. Voluntary desegregation programs, like the Lynn School district plan, and other similar voluntary plans that seek

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[2] Currently, the U.S. population is about 69.1% white/non-Hispanic, 12.5% Hispanic, 12.3% black, 3.6% Asian / Pacific Islander, and 0.9% American Indian / Alaskan Native. OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF, U.S. CENSUS BUREAU at 3 (Mar. 2001); POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: *1990* AND *2000*, Tbl. 3, U.S. CENSUS BUREAU (Apr. 2001). However, by 2050, the percentage of the population that is white/non-Hispanic is projected to decrease to approximately 52.8%. PROJECTIONS OF THE RESIDENT POPULATION BY RACE, HISPANIC ORIGIN AND NATIVITY: MIDDLE SERIES, 2050 TO 2070, POPULATION PROJECTIONS PROGRAM, POPULATION DIVISION, U.S. CENSUS BUREAU (Jan. 13, 2000). Moreover, since 1968, the proportion of white students enrolled in public schools has decreased by 17%, while the proportion of black students has increased by 29% and the proportion of Hispanic students has increased by 283%. ERICA FRANKENBERG, CHUNGMEI LEE AND GARY ORFIELD, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?, CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, at 23 (Jan. 2003) *available at* http://www.civilrightsproject.harvard.edu.

[3] According to one study, black students were found to be far less likely than white students to complete high school – only 78.7% completed high school, compared to 90.5% of white students. Black students are also far less likely to pursue higher education – in 1994, 47.3% of black students enrolled in eighth grade six years earlier had pursued no post-secondary

to achieve racial diversity in Massachusetts cities and towns, as well as the Seattle and Jefferson County plans before the Court, have a striking record of success. They further a compelling interest by ensuring that students nationwide gain access to the benefits of an integrated education at an early age. Moreover voluntary desegregation programs are narrowly tailored because they do not perpetuate illegitimate stereotypes and they do not unduly burden third parties. The *Amici* see rich educational as well as social benefits to such voluntary school desegregation plans and want to ensure that educators, school committees, and superintendents continue to have the choice to use such plans where necessary to achieve the educational opportunity promised students in the teachings of Horace Mann and this Court's decision in *Brown* over fifty years ago. For these reasons, and those more fully set forth below, the *Amici* respectfully request that the decisions of the Ninth Circuit in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162 (9th Circuit 2005), and Sixth Circuit in *McFarland v. Jefferson County Public Schools*, 416 F.3d 513 (6th Circuit 2005) be affirmed.

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education, whereas only 34% of white students fell into that category. FREDERICK D. PATTERSON RESEARCH INSTITUTE OF THE UNITED NEGRO COLLEGE FUND, THE AFRICAN-AMERICAN EDUCATION DATA BOOK, VOLUME III: THE TRANSITION FROM SCHOOL TO COLLEGE AND SCHOOL TO WORK *at* 118 (1997). High school graduation rates in some of the nation's largest school districts with large minority populations are appallingly low. Graduation rates for high school students in the class of 2004 were only 38.9% in New York; 47.3% in Baltimore; 49.2% in Detroit; 52.7% in Los Angeles; and in Boston 54.3%. Jing MAO & WALT HANEY, HIGH SCHOOL GRADUATION RATES: ALTERNATIVE METHODS AND IMPLICATIONS, EDUC. POL'Y ANALYSIS ARCHIVES (2004), available at *http://epaa.asu.edu/epaa/v12n55/v12n55.pdf.*

SUMMARY OF ARGUMENT

Voluntary desegregation programs, like those of Seattle and Jefferson County as well as that of the Lynn School District and other Massachusetts cities and towns, further a compelling state interest. A fully integrated society is vital to the continued growth of our nation. Moreover, public schools cannot achieve their central mission without integration. Voluntary desegregation programs promote integration by achieving a "critical mass" of racially diverse classrooms which erode the stereotypes and prejudices that persist in our society. Furthermore, they foster diversity at an age when doing so is critical to a child's development.

In addition, voluntary desegregation programs are narrowly tailored because, unlike "quota systems" that have been previously rejected by the Court, these programs do not perpetuate stereotypes or racial stigmas. Moreover, voluntary desegregation programs do not impose undue burdens upon third parties; indeed, they increase the overall benefit among the students in the school district population as a whole because all students are afforded greater access to a diversified classroom.

ARGUMENT

I. Public Schools Have a Compelling Interest in Maintaining Diverse Classrooms

Nearly thirty years ago, Justice Powell recognized "the attainment of a diverse student body" as a compelling state interest in the context of higher education. *Bakke*, 438 U.S. at 311-12. More recently, the Court formally affirmed Justice Powell's holding in *Grutter*. 539 U.S. at 325. The First, Sixth and Ninth Circuits have correctly held that voluntary desegregation

programs at the elementary, middle and high school level are equally as compelling (if not more so) as efforts to achieve racial diversity at the undergraduate and graduate school level. *See Comfort*, 418 F.3d at 15-16; *McFarland*, 416 F.3d 513, *aff'g per curiam*, 330 F.Supp. 2d 834, 852-3 (W.D. Ky. 2004); *Parents Involved in Cmty. Sch.*, 426 F.3d at 1177.

As the First Circuit explained, institutions of higher learning emphasize the exchange of ideas. *Comfort*, 418 F.3d at 18 n.9; *see also Bakke*, 438 U.S. at 312 (the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...."). A diverse student body at the undergraduate and graduate school level cultivates "diverse viewpoints, thereby enriching class room discussions and academic experiences." *Comfort*, 418 F.3d at 15.

Voluntary desegregation programs at the primary school level, on the other hand, primarily "foster[] racial cooperation rather than "viewpoint diversity."

> [A]t the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction. The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities -- and of whites at minority-dominated schools -- is crucial

> not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.

Id. at 17 n. 9. The First Circuit also recognized that voluntary desegregation programs create a "critical mass" of integration among student populations that is necessary to fully achieve the goals of integration. *Comfort*, 418 F.3d at 21 As discussed more fully below, the First Circuit's observations – both with respect to the prevalence and danger of racial stereotyping as well as the benefits of integrated primary school classrooms – find ample support from psychologists and social scientists.

A. The Harms of Racial Isolation and Stereotyping

The central mission of public education is to instill in all children "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), and to provide them with a foundation to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increase[ing] their human understanding and tolerance." *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (brackets in original and quotation marks omitted). Public schools cannot achieve these goals if they remain segregated along racial lines. Even if educational opportunities for white and minority students are equalized, minority children still must overcome the significant hurdle of negative stereotyping and prejudice.

Despite efforts to eradicate negative stereotyping and prejudice in the United States, both still persist, even among individuals who do not consciously perceive themselves to be prejudiced. In a 1989 study of young, white college students, participants were asked to rate black and white candidates for a resident counselor position. One third of the candidates were distinctly "qualified," one third were distinctly "unqualified," and one third simply met the minimum job requirements. The study participants consistently identified the most "qualified" candidates, regardless of race. Similarly, the participants consistently eliminated the least "qualified" candidates regardless of race. However, with respect to the middle third that were neither highly "qualified" nor "unqualified," the study participants selected and gave stronger recommendations to white candidates with much greater frequency. The study was repeated in 1999 with precisely the same results. JOHN F. DOVIDIO & SAMUEL L. GAERTNER ET AL., AVERSIVE RACISM AND SELECTION DECISIONS: *1989 and 1999*, 11 PSYCHOL. SCI. 315 (2000).

Unconscious stereotyping and prejudice has endured, in part, because individuals use categories to absorb and process information about the world around them. Racial and ethnic stereotyping operates at a basic level, independent of conscious attitudes, beliefs or perceptions. STEVEN J. SPENCER ET AL., AUTOMATIC ACTIVATION OF STEREOTYPES: THE ROLE OF SELF-IMAGE THREAT, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (Nov. 1998).

A learning environment that breaks down distinctions between social groups based upon stereotyping – conscious or unconscious – can diminish

prejudice. MAHZARIN R. BANAJI, ET AL., BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY, 134, 144 (A. Tesser & N. Schwartz eds., 2001). Because children form perceptions early in their development, it is critically important that the process of educating children about the differences among people from varied ethnic and racial backgrounds begin as early as possible in a child's development. Expert report of Dr. John Francis Dovidio and Expert report of Melanie Killen, *Comfort v. Lynn School Comm.*, C.A. No. 99-CV-11811NG (D. Mass. 1999), *Bollen v. Lynn School Comm.*, C.A. No. 01-CV-10365NG (D. Mass. 2001). *See also* SUSANNE E. DUTTON, ET AL. RACIAL IDENTITY OF CHILDREN IN INTEGRATED, PREDOMINANTLY WHITE, AND BLACK SCHOOLS, 138 J. OF SOC. PSYCHOL. 41, 42 (1998). Thus, the American public school system must play an ongoing role in instilling values of understanding and tolerance in the education of our children if the lingering effects of prejudice are to be eradicated.

B. Racially Integrated Primary Schools Provide an Indispensable Benefit to Our Society

The benefits of racial diversity in public school classrooms are significant. Indeed, as the *Grutter* Court noted, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330, *citing* Br. of Amicus Curiae Am. Educ. Research Ass'n. *et al.*, *Grutter v. Bollinger*, 539 U.S. at 330-331 (No. 02-241); M. CHANG ET AL., COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (2003). Harvard University's Civil Rights Project, has found that in

addition to developing a better understanding and greater tolerance for other racial groups, racial and ethnic integration is linked to greater academic achievement as well. CHUNGMEI LEE, RACIAL SEGREGATION AND EDUCATIONAL OUTCOMES IN METROPOLITAN BOSTON, 4-5 (April 2004) available at http://www.civilrightsproject.harvard.edu. As Professor Patricia Y. Gurin reported in connection with her study of the University of Michigan Law School, "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Expert Report of Patricia Y. Gurin, Gratz v. Bollinger*, 183 F.R.D. 209, (E.D. Mich. 1998) (No. 97-75231), *Grutter v. Bollinger*, 263 F. Supp 2d 209, (E.D. Mich. 1997)(No. 97-75928). The academic advantages gained from integrated classrooms are not limited to better test scores—students taught in integrated classrooms are more likely to graduate from high school, pursue higher education, and enter the workforce in more productive and higher-paying jobs. *See* studies cited by Br. of Amicus Curiae Nat'l. Educ. Assoc. at 25, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

School environments benefit from integration as well. Studies have demonstrated that "schools with balanced classrooms are more likely to be characterized by lower levels of racial tension and less racial polarization than schools with unbalanced classrooms." SANDRA KOSLIN ET AL., CLASSROOM RACIAL BALANCE AND STUDENTS' INTERRACIAL ATTITUDES, 45 SOCIOLOGY OF EDUC. 386, 405 (1972). Decreased levels of racial tension and polarization, in turn, makes schools more desirable,

allowing them to attract more highly qualified teachers. See Br. of Amicus Curiae Am. Sociological Ass'n at 9, *Grutter*, 539 U.S. 306 (No. 02-241).

C. Voluntary School Desegregation Programs are Integral to Achieving the Benefits of Integration

The benefits of integrated classrooms do not appear automatically with the mere presence of students of differing racial and ethnic groups, however. It is, therefore, necessary to create social conditions that allow group members to interact effectively with and learn about members of racial and ethnic groups different from their own. MAHZARIN R. BANAJI, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY at 144.

Specifically, two social conditions must work in tandem to achieve these benefits. The groups of students must have meaningful contact with one another and there must be sufficient representation of each group so that the students in the smaller group are not marginalized. As the students have more contact with more members of other groups and as the size of the groups approach equal size, the benefits of integrated classrooms likewise increase.

When members of different racial groups interact with one another they develop mutual understanding, respect, and empathy. These emotions in turn break down stereotypes and foster positive interracial relations. CHRISTOPHER ELLISON & DANIEL A. POWERS, THE CONTACT HYPOTHESIS AND RACIAL ATTITUDES AMONG BLACK AMERICANS, 75 SOC. SCI. Q. 385 (June 1994). The contact must be meaningful, however. There are four factors that are recognized as contributing to meaningful inter-group

contact: equal status among the groups; authority support for inter-group contact; common goals among members of the groups; and opportunities for personalized contact with members of the other groups. Expert report of Melanie Killen, *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 1999), (C.A. No. 99-CV-11811NG), *Bollen v. Lynn School Comm.*, (D. Mass. 2001) (C.A. No. 01-CV-10365NG). Where all four factors are present, members of all groups benefit.

Integrated K-12 schools are the model proving grounds for meaningful inter-group contact. In integrated schools, students have multiple opportunities to work together in small, personalized groups. Additionally, teachers are able to lend the necessary pedagogical support by encouraging inter-group interaction. It is not surprising, therefore, to find that studies have shown that in integrated schools, group members are able to transcend racial stereotyping and build meaningful relationships with members of other groups. *See e.g.*, DUTTON, 138 J. OF SOC. PSYCHOL. at 48.

In order for students to attain the full benefits of inter-group contact; however, timing is critical. Interracial contact during a student's formative years produces the strongest benefits. *Id.* at 42. Moreover, once students' stereotypes break down, the benefits are long-lasting. Adults who had meaningful interracial contact as students are much "more likely to function in desegregated environments in later life." JOMILLS HENRY BRADDOCK II & JAMES M. MCPARTLAND, SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE RACIAL SEGREGATION, 19 J. BLACK STUDIES 267, 269 (1989). For this reason, integration of public schools at the K -12 level is critical. By providing early inter-group contact,

integrated schools give students distinct and tangible advantages later in life that have been recognized by leaders of the United States Armed Forces, major American corporations, and the Supreme Court. Br. of Amicus Curiae Lt. Gen. Julius W. Becton, Jr. *et al.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Br. of Amicus Curiae 3M et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); *Grutter*, 539 U.S. at 330-31.

D. Voluntary School Transfer Programs Provide the "Critical Mass" That Is Essential To Effectively Achieving Integration

The benefits of interracial contact cannot be achieved; however, unless there are sufficient numbers in each group to overcome tokenism and to provide sufficient opportunities for inter-group contact. The Supreme Court in *Grutter* recognized that in a school setting "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 333. Achieving a critical mass "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." *Id.* at 330 (internal quotation marks omitted) (brackets in original); *see also* WILLIS D. HAWLEY ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION (1983). Nonetheless, these benefits cannot be separated from the necessity of a critical mass of minority representation, without which, these benefits are undermined.

Token representation of groups has severely negative consequences for both the majority and minority populations. Where one group is significantly underrepresented, its members feel isolated and

alienated. *See* Br. of Amicus Curiae The Am. Educ. Research Ass'n at 24, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), (citing studies). Similarly, token representation does not provide sufficient inter-group contact to overcome the stereotypes of the members of the majority group. Thus, where minorities are underrepresented, stereotypes and animosity among and between groups are reinforced. *See, e.g.*, SHELLY E. TAYLOR ET AL., CATEGORICAL AND CONTEXTUAL BASES OF PERSON MEMORY AND STEREOTYPING, 36 J. PERSONALITY AND SOC. PSYCHOL. 778 (July 1978). Achieving a critical mass is therefore essential to achieving the benefits of integration.

Critical mass is not defined by some specific number. Rather, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. Each group must be sufficiently represented for all students to feel safe and comfortable enough to interact with those of other races. ROXANNE HARVEY GUDEMAN, DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 251, 267-68 (Gary Orfield & Michael Kurlaender eds., 2001) *quoted in* Br. of Amicus Curiae The Am. Educ. Research Ass'n, at 24, *Grutter v. Bollinger*, 539 U.S. 306 (2003)(No. 02-241). To this end, voluntary transfer programs promote a "critical mass" by fostering diversity across the school district as a whole.

E. Residential Segregation Patterns Require that Race Conscious Desegregation Plans Be Permitted

Because of the patterns of residential segregation by race within cities, towns and districts across the United States and in Massachusetts, integrated schools

do not simply occur on their own. Conscious and voluntary programs fostering the diversity necessary for true educational opportunity must be specifically developed to meet this compelling interest. In Massachusetts, as is common elsewhere in the country, white students are concentrated in the suburbs while students of color are concentrated in the inner cities. Because of these residential patterns school segregation continues to be a major obstacle to equal opportunity for children of color, with black and hispanic students often attending schools unequal to those of whites, and with little opportunity for inter-racial contact. *See* JOHN R. LOGAN ET AL, SEGREGATION IN NEIGHBORHOODS AND SCHOOLS: IMPACTS ON MINORITY CHILDREN IN THE BOSTON REGION, Lewis MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH, UNIVERSITY OF ALBANY, (2003). Because school populations reflect these longstanding patterns of residential segregation, school districts need the ability to develop voluntary desegregation plans to achieve the diversity necessary for a good education. These plans must be able to take racial and ethnic differences into account in order to achieve their purpose.

II. Voluntary Desegregation Programs Are Narrowly Tailored

In addition to furthering a compelling state interest, voluntary desegregation programs appropriately have been held to be narrowly tailored for at least two reasons. These programs do not perpetuate illegitimate racial prejudices or stereotypes and they do not unduly burden third parties. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No.* 1, 426 F.3d 1162 (9th Cir. 2005); *McFarland v. Jefferson County Pub. Schs*, 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004).

A. Voluntary Desegregation Programs in the K-12 Context Do Not Perpetuate Racial Stigmas

The Court has previously recognized that the mechanical use of race as a means for artificially insulating ethnic minorities from competition in the context of graduate and undergraduate admission programs may perpetuate stigmas of racial inferiority. In particular, Justice Powell observed in *Bakke* that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298; *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility"). However, these concerns are not relevant with respect to voluntary desegregation programs in the K-12 context. *Comfort*, 418 F.3d at 17; *Parents Involved in Cmty. Sch.*, 426 F.3d at 1181; *McFarland*, 330 F. Supp. 2d at 859.

Unlike the competitive graduate and undergraduate admissions polices at issue in *Grutter*, *Gratz* and *Bakke*, voluntary desegregation programs in the K-12 grades do not exclude any students from participation, but only enrich their experience. All students have full, unfettered access to a school within their district. They are not denied "admission" as may be the case with schools of higher education. Thus, "there is ... little chance that the decisive use of race in a plan concerned strictly with racial diversity creates the unwarranted presumption that race is a proxy for viewpoint." *Comfort*, 418 F.3d at 18.

Moreover, when school assignments or transfers occur in programs like that of Seattle or Jefferson County they are not based upon the qualifications of the candidate. Accordingly, a decision to deny or reject an assignment or transfer should not foster a perception that a particular student is more or less "qualified" than another. Because these programs are typically not tied to merit, "the risk of imposing stigmatic harm by fueling the stereotype that certain groups are unable to achieve success without special protection" is not present." *Id.* In fact, these programs "strive for exactly the opposite result – that is to preempt racial stereotypes through inter-group contact." *Comfort*, 418 F.3d at 18. Consequently, "concerns motivating the individualized consideration requirements in a competitive, race-preferential admissions context that focuses on diversity along a number of axes are not present." *Id.*

B. Voluntary Desegregation Programs Do Not Unduly Harm Third Parties.

In addition to identifying racial stigmatization as a potential pitfall, the Court has held that race-based programs must not unduly harm third parties. *Grutter*, 539 U.S. at 341. This concern also is not present with voluntary desegregation programs in K-12 public schools because they do not impose undue harm upon third parties. *Comfort*, 418 F.3d at 17; *Parents Involved in Cmty. Sch.*, 426 F.3d at 1181. The policy behind voluntary desegregation programs is to "create communities of equal and integrated schools for everyone." *McFarland*, 330 F. Supp. 2d at 860. By definition, these communities are all-inclusive. *Id.* Therefore, these plans neither deny anyone a benefit nor impose a burden. *Id.* Indeed, they increase the overall

benefit among the students in the school district population as a whole because all students are afforded greater access to a diversified classroom. *See Comfort*, 418 F.3d at 19 ("by reducing racial isolation and increasing inter-group contact, [voluntary desegregation programs] ameliorate[] racial and ethnic tension and breed interracial tolerance.").

Moreover, to the extent these plans do impose a burden on third parties, that burden is minimal, even compared with the competitive admission program that was held constitutionally acceptable in *Grutter*. *See Comfort*, 418 F.3d at 17. As the Western District of Kentucky noted in *McFarland*, "the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices--one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when [a school district] assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or 'vertical' effects. This is so because ... as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible."

330 F. Supp. 2d at 860.

In short, a transfer or assignment to a specific school within a school district to which all students are guaranteed a seat, is markedly less burdensome than the denial of a spot at a unique or selective educational institution. *See Comfort*, 418 F.3d at 17.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court recognize that integration is critical to the success of public education and has many significant, tangible benefits and urge the Court to affirm the Sixth and Ninth Circuits' decisions upholding the school assignment policies of the Seattle and Jefferson County school districts.

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